



Litigation Update

Litigation Section News

August 2008

Coverage under uninsured motorist clause is not subject to arbitration.

Ins. Code §11580.2 requires insurers to provide coverage for injuries caused by uninsured motorists. Section 11580.2(f) provides that, if the damages to which the insured is entitled are disputed, the issues are to be decided in arbitration. But, in *Bouton v. USAA Casualty Insurance Co.* (Cal. Supr. Ct.; June 9, 2008) 43 Cal.4th 1190, [78 Cal.Rptr.3d 519, 2008 DJDAR 8415], our Supreme Court held that the issue whether the insured is covered under the policy is not subject to the arbitration requirement.

Parties are entitled to evidentiary hearing in probate proceeding. Although the probate court has jurisdiction under *Prob. Code* §11604 to set aside assignments of inter-

ests in estate, the court cannot do so on declarations if a party demands an evidentiary hearing. *Bennett v. Smith Heavy Industrial Transit Corp.* (Cal. App. Fourth Dist., Div. 3; June 13, 2008) 163 Cal.App.4th 1303, [78 Cal.Rptr.3d 435, 2008 DJDAR 8839].

Red light cameras are authorized by statute.

Veh. Code §21455.5 authorizes municipalities to use cameras to enforce red light violations. Taxpayers sought to invalidate the installation of such devices under *Code Civ. Proc.* §526a as constituting a waste of public property. They lost. Because the automated enforcement is authorized by law and generates revenue, it is not wasteful. *In re Red Light Photo Enforcement Cases* (Cal. App. Fourth Dist., Div. 1; June 13, 2008) 163 Cal.App.4th 1314, [78 Cal.Rptr.3d 413, 2008 DJDAR 8864].

Speedy-trial rights were not violated when defendant was charged in 2002 with a 1976 murder, based on a DNA. The California Supreme Court rejected a defendant's claim he was denied a speedy trial when he was charged with a crime committed 26 years earlier. The case was filed after DNA testing identified him as a murderer. The justification for the delay in the prosecution was strong because there was not enough evidence to charge defendant until a DNA "cold hit" identified him as the source of evidence found after the murder. *People v. Nelson* (Cal. Supr. Ct.; June 16, 2008) 43 Cal.4th 1242, [185 P.3d 49, 78 Cal.Rptr.3d 69, 2008 DJDAR 8878].

Failure to mediate may preclude award of attorney fees. Residential purchase agreements generally contain a clause requiring mediation before filing suit. The failure

to request mediation first, precludes an award of attorney fees to plaintiff. In *Lange v. Schilling* (Cal. App. Third Dist.; May 28, 2008) 163 Cal.App.4th 1412, [78 Cal.Rptr.3d 356, 2008 DJDAR 8949], the trial court awarded fees to a successful plaintiff even though he had not sought mediation before filing suit. Stating "the agreement means what it says," the Court of Appeal reversed the fee award.

Are you a lawyer or an attorney?

Is there a difference? The blog Legal Pad reports that a person holding a JD but not admitted to the bar identified himself as a "lawyer" in making campaign contributions. A spokesperson for his law school stated "All of the graduates of the Juris Doctor program are attorneys, licensed or not." The blog continued "that seemed reasonable to us, but struck the wrong chord with David M. Bigeleisen, a San Francisco attorney and legal ethics expert who said that having a JD does not an attorney make. Bigeleisen said that a lawyer is someone who is licensed to practice law, while an attorney is a lawyer who represents a client." And here your editor, who has not been licensed to practice law for over 20 years thought he and all other judges were still lawyers. Perhaps we should call ourselves "retired lawyers."

No contractual attorney fees if action is voluntarily dismissed. *Civ. Code* §1717, creates a bilateral right to attorney fees to the prevailing party if the contract provides for such fees to one of the parties. But, §1717 (b) (2) provides that contractual attorney fees may not be awarded where plaintiff voluntarily dismisses the action. *Ford Motor Credit Co. v. Hunsberger* (Cal. App. Fourth Dist., Div. 1; June 18, 2008) 163 Cal.App.4th 1526, [78 Cal.Rptr.3d 661, 2008 DJDAR 9061].

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"Prevailing party" issue to be considered by Supreme Court. The California Supreme Court granted review in *Goodman v. Lozano* (Case No. S162655; June 18, 2008) superseding the Cal. App. Fourth, Div. 3 decision at 159 Cal.App.4th 1313, [72 Cal.Rptr.3d 275] (as Mod. March 7, 2008). The case arose where a plaintiff prevailed in trial but in an amount less than a prior settlement which resulted in a zero judgment for plaintiff. Is there a prevailing party entitled to costs and, where appropriate, attorney fees? Appellate courts have given conflicting answers to the question. In another year or so, we will know.

Section 998 offer to compromise may not include claims beyond those in issue. Plaintiff filed two separate suits against his insurer, involving damages to his real estate at different times and from different causes. Defendant filed a Code Civ. Proc. §998 offer to compromise in one of these cases, contingent upon plaintiff releasing it from "all claims." After plaintiff recovered less than the settlement offer, the trial court awarded trial costs to defendant. In *Chen v. Interinsurance Exchange of the Automobile Club, C.A.* (Cal. App. Second Dist., Div. 8; June 19, 2008) 164 Cal.App.4th 117, [78 Cal.Rptr.3d 755, 2008 DJDAR 9227] (As Mod. July 21, 2008), the

Court of Appeal reversed. A valid offer under section 998 may not cover a claim not in issue in the case where the offer was made.

Minor not bound by trust's "no contest" clause. A minor trust beneficiary, through his guardian ad litem, brought a petition under *Prob. Code* §21320 to determine whether a claim he proposed to file would violate the "no contest" clause of the trust. The Court of Appeal affirmed a decision of the trial court holding that, as a minor, plaintiff would not violate the clause because he would not voluntarily participate in a trust contest. *Safai v. Safai* (Cal. App. Sixth Dist., Div. 3; June 25, 2008) 164 Cal.App.4th 233, [78 Cal.Rptr.3d 759, 2008 DJDAR 9562].

Federal law preempts Calif. Disabled Persons Act on attorney fees. In *Hubbard v. SoBreck, LLC* (9th Cir.; June 27, 2008) [2008 U.S. App. LEXIS 13563, 2008 DJDAR 9858], plaintiff sued in federal court claiming defendant violated both the Americans with Disabilities Act (ADA) and the California Disabled Persons Act (CDPA). The conduct underlying the two claims was the same: barriers depriving them of full access to defendant's restaurant. Defendant won after a bench trial and the District Court awarded attorney fees to defendant.


The 9th Circuit reversed. The ADA only permits the award of attorney fees if the claims were frivolous; under CDPA fees are awarded to the prevailing party. Because the trial court did not determine that the claims were frivolous, no fees could be awarded under ADA. Further, no fees could be awarded under the CDPA because federal preemption prohibits an award of fees under the state law.

Court cannot order legislature to appropriate funds in state budget. In *County of San Diego v. State of California* (Cal. App. Fourth Dist., Div. 1; July 1, 2008) 164 Cal.App.4th 580, [2008 DJDAR 10109], the trial court issued a writ of mandate ordering the state to pay the counties of San Diego and Orange for reimbursement required under the California Constitution for the cost of state mandated programs. The Court of Appeals held that such an order violates the separation of powers doctrine and reversed the order.

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